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CHARLES ELMO

In the

SUPREME COURT OF THE UNITED STATES

No. [illegible] October Term, 1930.

The Texas and Pacific Railway Company et al., Appellants,

versus

The United States of America et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

MOTION BY APPELLANTS TO ADVANCE.

THOS J. FREEMAN,
ESMOND PHELPS,
A. L. BURFORD,
R. E. MILLING, JR.,
LUTHER M. WALTER,
JOHN ST. PAUL, JR.,
PERCY SAINT,
W. M. BARROW,
ROBERT L. W. THOMPSON,
Solicitors for Appellants.

WARLICK LAW PRINTING CO.—DALLAS

In the

SUPREME COURT OF THE UNITED STATES

No. 744, October Term, 1930.

The Texas and Pacific Railway Company et al., Appellants,

versus

The United States of America et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

MOTION BY APPELLANTS TO ADVANCE.

COME NOW the appellants in the above-entitled cause and move that said cause be advanced for an early hearing, and in support of their motion make the ensuing statement of the matters involved and the reasons relied upon for such advancement:

The fundamental question involved is the validity of certain orders entered by the Interstate Commerce Commission in passing upon the relationship and lawfulness of designated rate adjustments assailed in two certain complaints filed with and decided by it, namely, cause No. 12798 on its docket, entitled Galveston Commercial Association v. Galveston, Harrisburg & San Antonio Railway Company et al., and cause No. 20685

on its docket, entitled The Cooper Grocery Company et al. v. The Angelina and Neches River Railroad Company et al. Each of these complaints relates to the interior rail rates on shipments of foreign and/or coastwise traffic moving through certain ports on the Gulf of Mexico. In order that the Court may appreciate sufficiently for the purpose of this motion the significance and bearing of these orders, it is believed that the following general explanation thereof will be helpful.

By orders entered in the first of these complaints the Commission required the carriers defendant in said proceeding, including the appellant carriers herein, which serve with their own rails the port of New Orleans, Louisiana, but not any of the Texas ports, to cease and desist as to some fourteen designated commodities from the practice theretofore voluntarily indulged in by said appellant carriers of maintaining thereon, when transported in carloads to or from the ports in export, import, or coastwise movement, the same inland rail rates between interior points of origin and destination, as the case may be, and said port of New Orleans as are contemporaneously maintained on such traffic in carload movement by competing carriers between the same interior points of origin and destination and the port of Galveston, Texas, or any of the adjacent Texas ports.

Said orders further directed and required said de-

fendant carriers, including the appellant carriers herein, as to interior points from which the shortest rail distance to New Orleans exceeds the shortest rail distance to Galveston by more than 25 per cent, to establish, on or before the respective dates designated in said orders, and thereafter to maintain and apply, for the rail transportation in export, import, or coastwise movement, as the case may be, of said fourteen commodities, in carloads, lower rates to or from shipside at Galveston, Texas, and other Texas ports taking the same rates, than are contemporaneously maintained and applied for the transportation in export, import, or coastwise movement, as the case may be, of the same commodities, in carloads, to or from the port of New Orleans, Louisiana, to the extent of specified rate arbitraries or differentials designated and prescribed by said Commission. The rate arbitraries or differentials so prescribed range in amount variously from 1 cent per 100 pounds, in the case of grain and asphalt, to 9 and 12 cents per 100 pounds, in the case of green coffee and cotton factory products, respectively.

The evidence before the Commission (and now before the Court) discloses that the ocean rates on said commodities for the water transportation beyond the gulf ports involved are generally the same to and from each of said gulf ports, and the Commission so stated in its findings accompanying said orders and by reference

made a part thereof. (See 128 I. C. C. 365.) Hence, the effect of such orders is to compel and enforce higher *through* rates and charges for the rail and water transportation of the aforesaid commodities when destined for movement by way of the port of New Orleans, Louisiana, than the *through* rates contemporaneously applying for the rail and water movement thereof by way of the port of Galveston, Texas, or any adjacent Texas port taking rail rates on such traffic the same as or lower than the port of Galveston, notwithstanding the willingness and ability of the carrier appellants and certain of their connecting lines of railway to maintain rail rates on such traffic to and from New Orleans on a parity with the rail rates maintained by competing lines of railway thereon to and from the respective Texas ports.

By order entered in cause No. 20685 on its docket, the Commission directed and required the carriers defendant therein, including the carriers appellant herein, to cease and desist, on or before the date designated in said order, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of green coffee, in carloads, from New Orleans, Louisiana, to Waco, Texas, a rate which shall exceed the rate contemporaneously maintained and applied on the same commodity from New Orleans to Dallas and Fort Worth, Texas.

The current rate on green coffee, in carloads, from the Texas gulf ports of Houston and Galveston being the same to Dallas and Fort Worth as to Waco, and the interested carriers, including the carriers appellant herein, being required by the Commission's aforesaid orders in cause No. 12798 on its docket to maintain the rate on green coffee, in carloads, from New Orleans, Louisiana, to Waco, Texas, not less than 9 cents in excess of the carload rate contemporaneously applying on that commodity from Houston and Galveston to Waco, Texas, the effect of the aforesaid order in cause No. 20685 is to require the maintenance by the carriers appellant herein of a rate on green coffee, in carloads, from New Orleans to Dallas and Fort Worth, points located on the rails of The Texas and Pacific Railway Company, one of said appellants, 9 cents in excess of the carload rate contemporaneously applying on that commodity to those points from the ports of Galveston and Houston, Texas.

As a direct and immediate consequence of the foregoing orders of the Interstate Commerce Commission, the inland shippers and receivers, as the case may be, of the aforesaid fourteen commodities are denied the opportunity and privilege of having their foreign and coastwise shipments of said commodities move through the port of New Orleans except upon the penalty of having to pay *through* freight charges thereon in excess

of the lower *through* freight charges contemporaneously applying on foreign and coastwise shipments of such commodities which move through the port of Galveston or one of the other nearby Texas ports to the extent of the difference brought about by the rate arbitraries or differentials prescribed by the Commission, as stated above, this notwithstanding the willingness of the carriers appellant herein, together with many of their connecting lines of railway, to maintain rail rates to and from the port of New Orleans on such foreign and coastwise traffic which are the same as the rail rates contemporaneously applying on like traffic to and from the port of Galveston and other nearby Texas ports. The evidence discloses, and it has been so found by the Commission (100 I. C. C. 115), that the rail carriers, including those appellant herein, are able to handle the traffic in question to and from New Orleans at a profit on the rates applying to and from the aforesaid Texas ports, and hence the practice of so doing heretofore voluntarily indulged in by the appellant carriers, but now prohibited by the aforesaid orders of the Interstate Commerce Commission, does not operate to throw a burden upon other traffic.

The lines of railway of the respective carriers appellant herein extend from New Orleans in a northwesterly direction to the eastern boundary of the State of Texas near Shreveport, Louisiana, and thence in a general

westerly direction into or through the State of Texas. At numerous points in Texas located farther from New Orleans than from Galveston by more than 25 per cent in distance, and hence within the scope of the aforesaid orders of the Commission, the lines of railway of said appellants are intersected by north-and-south lines of competing carriers which extend directly to Galveston, as well as to adjacent Texas ports.

With an equality of rail rates prevailing to and from the respective competitive Louisiana and Texas ports, foreign and coastwise traffic originating at or destined to such competitive points of intersection is free to move over the rails of said carrier appellants to or from the port of New Orleans, or else over the rails of their competitors extending to Galveston or other Texas ports. Because of the aforesaid orders of the Interstate Commerce Commission under review herein, however, the carriers appellant herein are arbitrarily denied the right and opportunity to handle such competitive traffic over their rails and through the port of New Orleans on rates equal to those which apply thereon when the movement occurs over the rails of their competitors and through one or the other of said Texas ports. The inevitable effect of this is to divert the movement of such traffic from the rails of said appellant carriers and to the rails of their competitors, and to deprive the former of the revenues they otherwise would enjoy thereon.

The carrier appellants were plaintiffs in the court below, and brought suit under the provisions of the Urgent Deficiencies Act of October 22, 1913, ch. 32, 38 Stat. 208, 219-220 (U. S. C., Tit. 28, § 41 [28], 47 and 47a), to enjoin, set aside, annul, and suspend the aforesaid orders of the Interstate Commerce Commission, and each of them. It was alleged by said appellants that said orders are arbitrary, unreasonable, unlawful, and void, and that they are unsupported by the evidence of record and by the Commission's findings of fact based thereon, are repugnant to the provisions of the Interstate Commerce Act, and particularly of § 3 and of subdivision 4 of § 15 thereof, are contrary to and violative of clause 5 of § 9 of Article I of the Constitution of the United States, in that they give preference by a regulation of commerce to the ports of one state (Texas) over those of another (Louisiana), and operate to deprive said carrier appellants of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, as fully specified in the respective bills of complaint of said carrier appellants, and in the assignment of errors herein filed. It was further alleged that in its findings and orders the Commission has misconceived the meaning of and misapplied § 500 of the Transportation Act, 1920, and § 8 of the Merchant Marine Act, 1920.

The other appellants herein were permitted to inter-

vene in the court below in support of the relief sought by the appellant carriers in their respective bills of complaint.

The District Court denied all the contentions of the plaintiffs and of the intervenors supporting the complaints, and entered an order or decree dismissing said bills of complaint, from which action said plaintiffs and their supporting intervenors have taken this appeal to this Court. The case was docketed in this Court on February 18, 1931, and the Jurisdictional Statement for Appellants was filed on or about March 3, 1931. The transcript of the record will probably be printed by June 1, 1931.

The reasons why the case should be advanced are the following:

It is provided in said Urgent Deficiencies Act of October 22, 1913, that the final judgment or decree of a district court in such cases may be reviewed by the Supreme Court of the United States upon appeal, and that appeals in such cases shall have priority of hearing and determination in this court over all other causes except criminal causes.

The orders of the Interstate Commerce Commission in cause No. 12798 on its docket which related to rates on export, import, and coastwise shipments of the commodities involved, as the case may be, to aid from in-

terior points *other than those* located on the rails of the appellant carriers became effective prior to the filing of their respective bills of complaint in the court below, and rates in conformity therewith were duly published and made effective. They likewise having been unsuccessful in obtaining an order staying the effectiveness thereof pending this appeal, the order of said Commission in cause No. 20685 on its docket and its last order entered in said cause No. 12798 (extending the scope of the prior orders entered therein to points on the lines of the carrier appellants more than 25 per cent farther distant from New Orleans than from Galveston) have become effective since the decree dismissing said bills of complaint was entered by the District Court, and rates in conformity therewith have been published and are now in force and effect.

Accordingly, as previously stated, the carriers appellant herein are now compelled, perforce of such orders, to maintain rates to and from the port of New Orleans, Louisiana, for the rail transportation of the affected fourteen commodities in export, import, and coastwise movement which are higher than the corresponding rail rates applying to and from the port of Galveston, Texas, and other nearby Texas ports, on shipments of like traffic through such ports in export, import, and coastwise movement. The ocean rates applying beyond the ports on this traffic being ordinarily the same from and

to each of said gulf ports, the *through* rail-and-water rates applying thereon via the port of New Orleans are higher than the *through* rail-and-water rates contemporaneously maintained via the respective Texas ports to the extent of the differences in the rail rates prescribed by said Interstate Commerce Commission, as aforesaid.

The carriers appellant herein, whose rails extend to the port of New Orleans, Louisiana, but do not reach any of the Texas ports, are thereby summarily deprived of an opportunity to compete with the lines serving said Texas ports in the handling of such export, import, and coastwise traffic through the port of New Orleans except under the handicap of the rate arbitraries or differentials imposed by the Interstate Commerce Commission thereon, as aforesaid, thus arbitrarily forcing and diverting the movement of a large volume of such export, import, and coastwise traffic away from the rails of said carrier appellants and the port of New Orleans, and to the rails of their competitors serving the aforesaid Texas ports, and to such Texas ports. In consequence of the arbitrary diversion of the movement of such traffic from their rails, said carrier appellants are deprived of substantial revenues which otherwise would accrue to them were they permitted to maintain and apply the same rates on the traffic in question to and from the port of New Orleans as are contemporaneously maintained thereon to and from the said Texas ports.

Furthermore, while the rates under review herein apply only to and from certain ports located on the Gulf of Mexico, the issues under review herein, together with the principles relating thereto, are national in their scope, since similar competitive conditions exist as respects the rates applying on foreign and coastwise traffic moving through various other United States ports, including those located both on the Atlantic seaboard and on the Pacific coast Because of the foregoing, an early decision by this court upon the validity of the orders of the Interstate Commerce Commission herein assailed is of vital importance to the commerce of the nation.

Wherefore, appellants pray that this cause be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

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